GAMING EDITION

Gaming 103

Indian Gaming Regulatory Act (IGRA) and Tribal Compacts

Wednesday, May 12, 2021
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Indian Gaming Regulatory Act (IGRA) – History

- Before 1988 states had no power to regulate gaming conducted by Indian tribes on their reservations.
- The Indian Gaming Regulatory Act (IGRA) was passed in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), holding California could not enforce its regulatory laws related to gaming activities such as bingo and card rooms on Indian lands. The Court noted that only Congress, under the authority granted it by the U.S. Constitution's Indian Commerce Clause, could give states jurisdiction over Indian gaming.
- IGRA's main stated purpose is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.

IGRA – Overview

- IGRA represents a compromise solution to the many issues raised by Indian gaming activities, attempting to balance competing interests and satisfy both tribal needs and state concerns.

- Gaming must be conducted by federally recognized tribes.

- Gaming must happen on land held in trust before the passage of IGRA.
  - On newly acquired tribal lands, gaming is generally prohibited unless one of several exceptions is satisfied.

- Net revenues from gaming may only be used for funding tribal government operations or programs; providing for general welfare of the tribe and its members; promoting tribal economic development; donating to charitable organizations; or helping fund local government agencies' operations.

IGRA – Classes of Gaming Activities

- IGRA divides Indian gaming into three classes and provides a different regulatory scheme for each class.
  - Class I games include social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.
  - Class II games include bingo, pull-tabs, punch boards, and similar games, as well as aids to those games; and non-banking card games that are either explicitly authorized by the laws of the state or not explicitly prohibited by the laws of the state and are played at any location in the state.
  - Class III games are defined as all forms of gaming that are not class I or class II.

IGRA – Class III Gaming

- Class III gaming includes, but is not limited to:
  - Any house banking game, including card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games); casino games such as roulette, craps, and keno;
  - Any slot machines and electronic or electromechanical facsimiles of any game of chance;
  - Any sports betting and pari-mutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or
  - Lotteries.

IGRA – Class III Gaming

- Class III gaming activities are lawful on Indian lands only if they are:
  - Authorized by an ordinance or resolution that is adopted by the governing body of the Indian tribe having jurisdiction over such lands;
  - Located in a state that permits such gaming for any purpose by any person, organization, or entity; and
  - Conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the state that is in effect.

IGRA – Administration

- Responsibility for administering the law's substantive provisions is divided between the Secretary of the Interior (Secretary) and the National Indian Gaming Commission (NIGC).
- Class I gaming regulation is within the exclusive jurisdiction of the tribe.
- Class II gaming is subject to joint regulation by the tribe and the federal government under IGRA, with the NIGC and its chairman having regulatory oversight.
- Class III gaming is under the regulatory oversight of the Secretary, the NIGC, the tribe and the state as provided for in a compact.

IGRA – Duties of the Secretary

- The Secretary may approve or disapprove of class III compacts under IGRA.
- In limited circumstances, the Secretary may prescribe procedures under IGRA under which class III gaming may be conducted.
- In limited circumstances, the Secretary may approve the acquisition into trust of lands for gaming purposes after IGRA's effective date, of October 17, 1988, under IGRA.

IGRA – Tribal-State Compacts

- Because the U.S. Constitution's Indian Commerce Clause gives plenary power to Congress to regulate commerce with Indian tribes, states would not have control over Indian gaming without the authority provided under IGRA.
- Under a compact, the federal government allows regulatory oversight of class III Indian gaming to be allocated between states and Indian tribes as developed through the compact process, with further oversight by the federal government.

IGRA – Items for Compact Negotiation

- Application of tribal or state gaming laws and regulations.
- Allocation of criminal and civil jurisdiction between the tribe and the state with respect to gaming activities.
- The state's collection of the costs of regulation from the tribe.
- Remedies for breach of contract.
- Standards for gaming operations and facility maintenance.
- Any other subjects that are directly related to the operation of gaming activities.

IGRA – Tribal-State Compact Process

- The tribe initiates negotiations with the state in which its lands are located.
- The tribe and the state are required to negotiate in good faith.
- Federal courts have jurisdiction to hear a claim by a tribe that the state has failed to negotiate in good faith. However, tribes cannot sue states that refuse to negotiate or fail to negotiate in good faith unless states waive their sovereign immunity (*Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)).
- If a state has waived its sovereign immunity, the court's remedies include ordering a state and tribe to conclude a compact within 60 days, or if unable to do so, to submit their last best offer for a compact to a mediator who will then select the more appropriate plan.

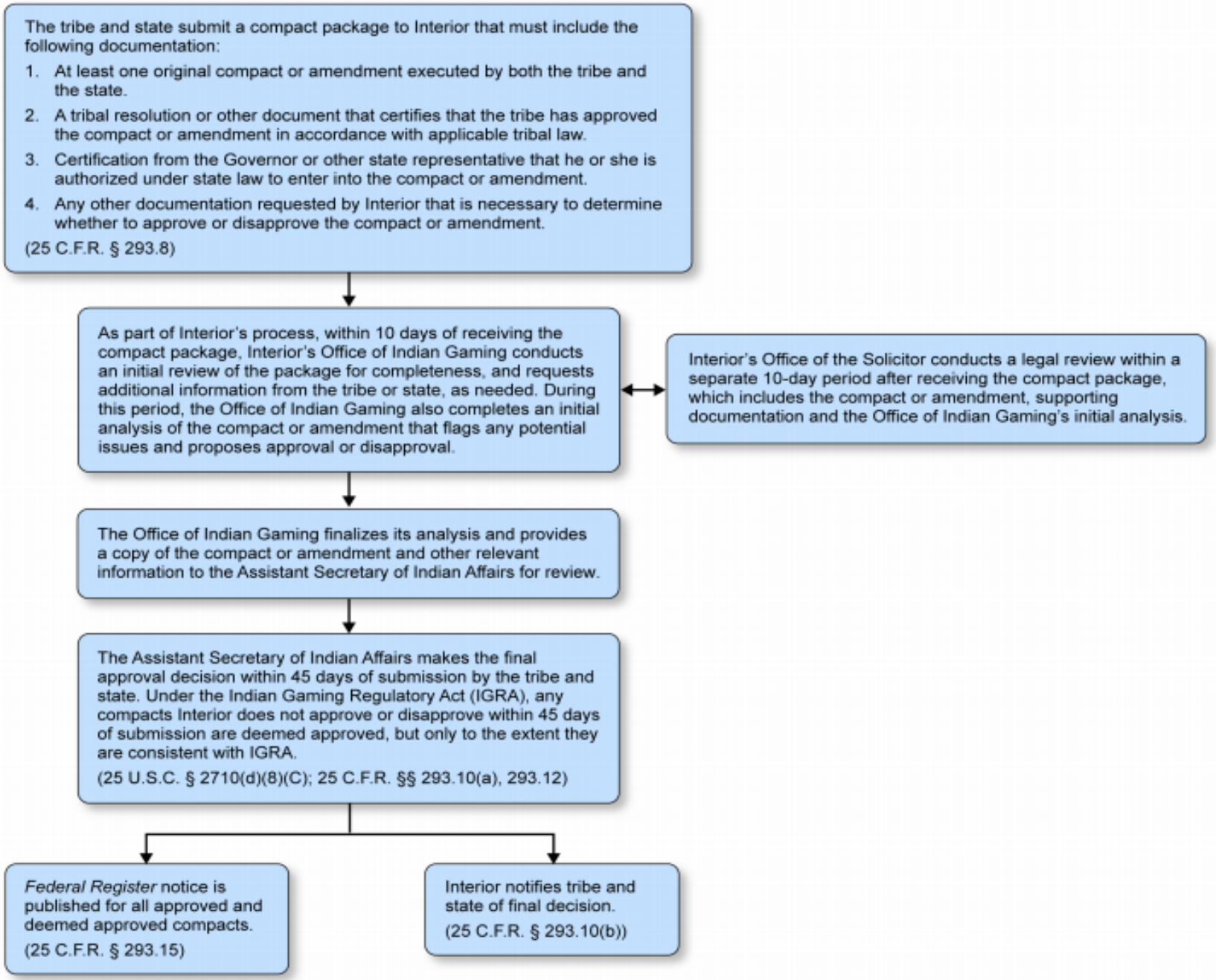
IGRA – Compact Approval

- The Secretary may disapprove a compact only if the compact violates IGRA (including revenue sharing provisions), federal law or the United States' trust obligations to the tribe.
- If not disapproved within 45 days, a compact is deemed approved to the extent consistent with IGRA.
- Effective once published in the Federal Register.
- Amendments require the Secretary's approval.

IGRA – Revenue Sharing

- A compact may allow for the state to recoup the costs of regulation from the tribe.
- The state may not impose a tax, fee, charge, or other assessment on Indian gaming.
- The Department of Interior (Interior) decision letters show that it conducts a two-pronged analysis to determine whether a revenue sharing provision violates IGRA.
  - Whether the state has offered "meaningful concessions" in exchange for the tribe's revenue sharing. For example, a state can offer a tribe exclusivity—the sole right to conduct gaming in the state, or a specific geographic area within the state.
  - Whether the concessions offered by the state provide a substantial economic benefit to the tribe that is commensurate with the value of the payments from the tribe.

Department of the Interior's Compact Review Process



Source: GAO analysis of Department of the Interior (Interior) information. | GAO-15-355

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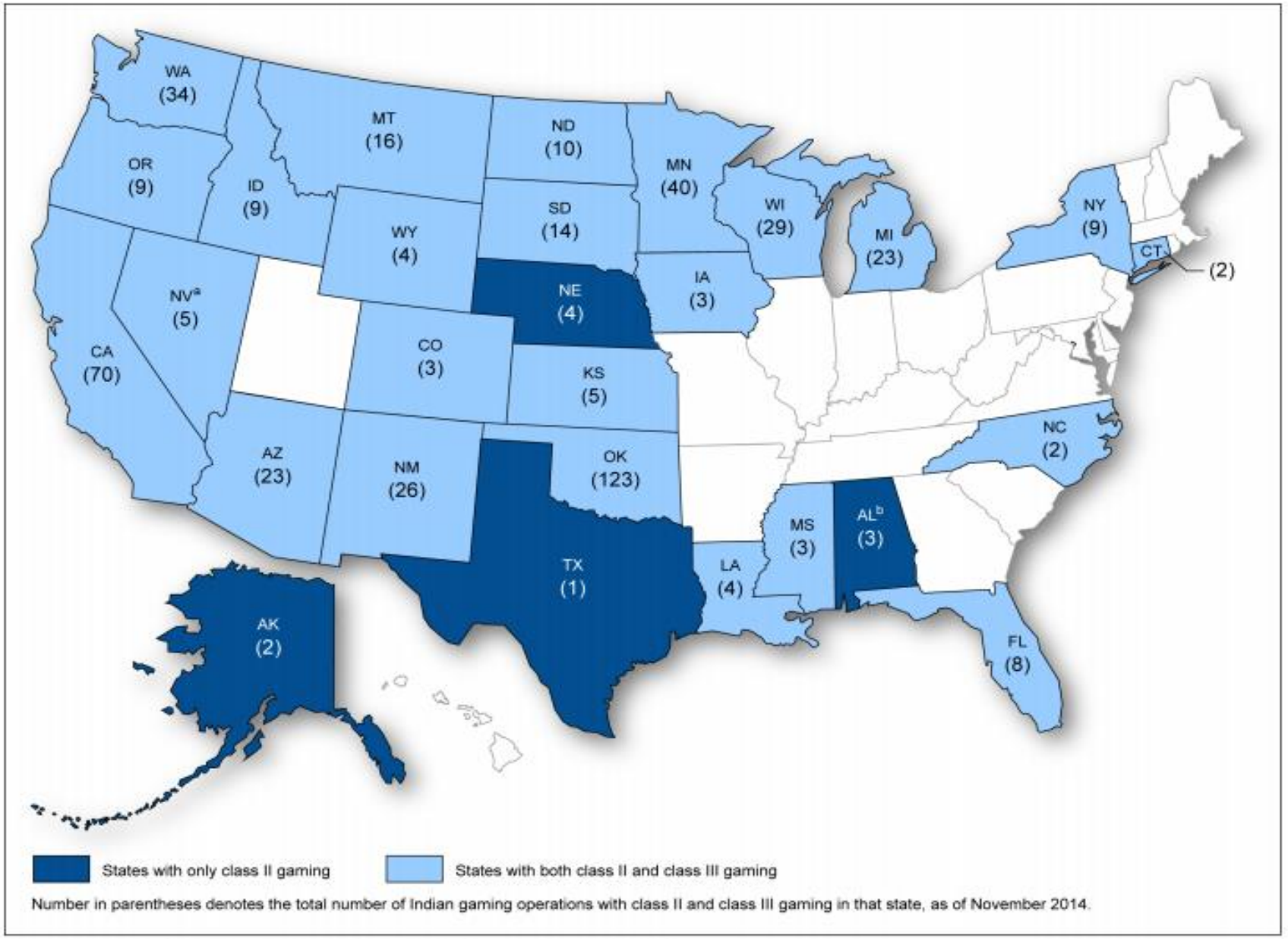
Tribal Compacts – Overview

- Twenty-four states have Indian gaming operations with class II and class III gaming and four states have Indian gaming operations with class II gaming only.
- From 1998 through fiscal year 2014, 516 compacts and compact amendments were submitted to the Department of Interior. Interior approved 78 percent of compacts; did not act to approve or disapprove 12 percent; and the remaining 10 percent were disapproved, withdrawn, or returned.
  - The most common reason for disapproval was that the compact contained revenue sharing provisions Interior found to be inconsistent with IGRA.
  - Interior did not approve or disapprove 60 of the 516 compacts submitted within the 45-day review period. As a result, these compacts were deemed approved to the extent that they are consistent with IGRA.
- As of 2019, 306 tribal compacts, federal procedures, or their amendments (compacts) were in effect.

Sources: Tribal compact statistics are from Indian Gaming: Regulation and Oversight by the Federal Government, States, and Tribes, Report GAO-15-355, June 2015 and Connecticut Office of Legislative Research Report 2019-R-0135.

Tribal Compacts – States with Class II and Class III Gaming

Figure 2: States with Class II and Class III Indian Gaming as of November 2014



Sources: GAO analysis of National Indian Gaming Commission data; Map Resources (map). | GAO-15-355

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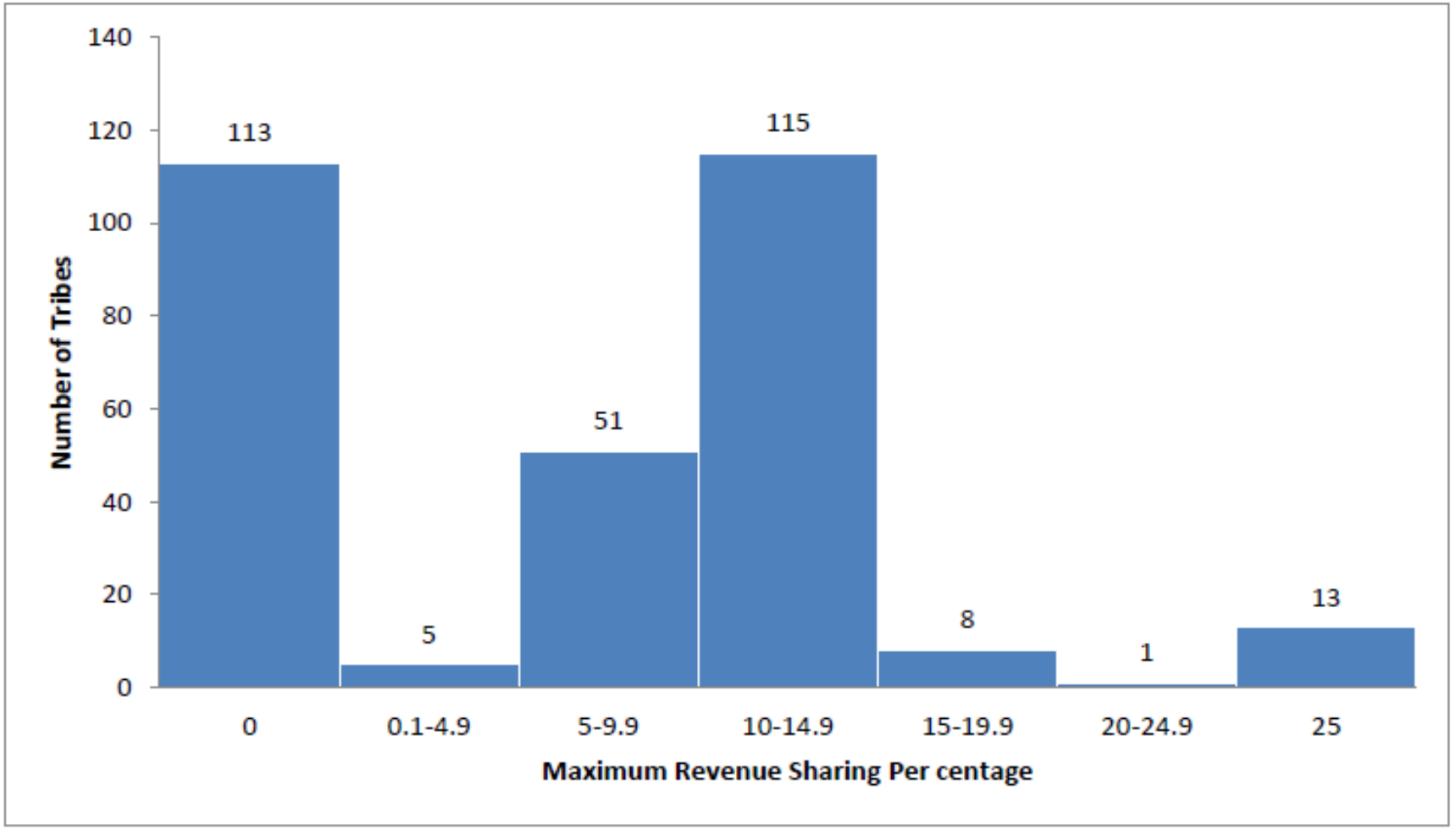
Tribal Compacts – Revenue

- In fiscal year 2013, the Indian gaming industry included more than 400 gaming operations in 28 states and generated gross revenues of $28 billion and net revenues of $11.3 billion.
- Collectively, Arizona, California, Michigan, New York, Oklahoma, and Washington accounted for about 60 percent of all Indian gaming operations and Indian gaming revenue generated in 2013.
- As of 2019, of the 193 compacts that include revenue sharing provisions, 164 involve payments tied to gaming revenues and include a maximum payment, ranging from 2.0 percent to 25 percent of all or a portion of gaming revenues.

Maximum Revenue Sharing Percentages



Sources: Indian Gaming: Regulation and Oversight by the Federal Government, States, and Tribes, Report GAO-15-355, June 2015 and Connecticut Office of Legislative Research Report 2019-R-0135.

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Tribal Compacts – State Regulatory Role

- **Active Regulatory Role** – states that perform the majority of monitoring activities, including formal and informal inspection or observation of gaming operations; review of financial report(s); review of compliance with internal control systems; audit of gaming operation records; verification of gaming machines computer functions; review of gaming operator's surveillance; and observation of money counts.
  - The following seven states have an active regulatory role: Arizona, Connecticut, Kansas, Louisiana, New York, Oregon, and Wisconsin.
- **Moderate Regulatory Role** – states that monitor operations at least annually, and collect funds from tribes to support state regulatory activities.
  - The following eleven states have a moderate regulatory role: California, ***Florida***, Iowa, Michigan, Minnesota, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, and Washington.
  - About 75 percent (303 of 406) of class III Indian gaming operations are located in these states and generated 69 percent of all gross Indian gaming revenue in fiscal year 2013.
- **Limited Regulatory Role** – states that have a limited regulatory role will negotiate compact terms but do not incur substantial regulatory costs or regularly perform monitoring activities.
  - The following six states have a limited regulatory role: Colorado, Idaho, Mississippi, Montana, North Carolina, and Wyoming.